

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TIMOTHY E. BROOME,

Plaintiff,

v.

CAROLYN W. COLVIN, Commissioner
of Social Security,¹

Defendant.

No. CV-11-0386-FVS

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument. (ECF No. 13, 16). Attorney Maureen J. Rosette represents plaintiff; Special Assistant United States Attorney Summer Stinson represents the Commissioner of Social Security (defendant). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** defendant's Motion for Summary Judgment.

JURISDICTION

Plaintiff filed applications for disability insurance benefits (DIB) and supplemental security income (SSI) on March 18,

¹As of February 14, 2013, Carolyn W. Colvin succeeded Michael J. Astrue as Acting Commissioner of Social Security. Pursuant to Fed.R.Civ.P. 25(d), Commissioner Carolyn W. Colvin is substituted as the defendant, and this lawsuit proceeds without further action by the parties. 42 U.S.C. § 405(g).

1 2010, alleging disability as of September 12, 2003 (Tr. 149-163).
2 Plaintiff amended his alleged onset date from September 12, 2003,
3 to January 1, 2007, at the administrative hearing (Tr. 48-49). The
4 applications were denied initially and on reconsideration.

5 Administrative Law Judge (ALJ) Marie Palachuk held a hearing
6 on December 9, 2010 (Tr. 43-78). The ALJ issued an unfavorable
7 decision on January 7, 2011 (Tr. 16-30), and the Appeals Council
8 denied review on August 25, 2011 (Tr. 1-6). The ALJ's decision
9 became the final decision of the Commissioner, which is appealable
10 to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff
11 filed this action for judicial review on October 7, 2011. (ECF
12 Nos. 2 & 4).

13 **STATEMENT OF FACTS**

14 The facts have been presented in the administrative hearing
15 transcript, the ALJ's decision, and the briefs of the parties.
16 They are only briefly summarized here.

17 Plaintiff was born on April 9, 1968, and was 40 years old at
18 the time of the alleged onset date (Tr. 59). At the
19 administrative hearing, plaintiff testified he was divorced, had
20 no children, and lived in a clean and sober housing facility (Tr.
21 59, 63-64). Plaintiff had obtained his GED and had attended
22 almost one full year of community college classes (Tr. 60). His
23 sole source of income at the time was public assistance (Tr. 68).

24 Plaintiff indicated he stopped working in 2006 because his
25 employment was terminated following a failed drug test (Tr. 62).
26 Plaintiff testified he had not used methamphetamine since November
27 of 2007 and had not consumed alcohol for almost 18 months prior to
28 the December 9, 2010 hearing (Tr. 62-63).

1 Plaintiff testified he had hepatitis which caused fatigue and
2 required him to take daily naps normally lasting an hour or two
3 (Tr. 64). However, he was not receiving treatment for hepatitis,
4 nor was there an established plan with his doctor to follow up on
5 the diagnosis. He described his sleep at night as "atrocious"
6 with terrible nightmares five to ten times each night (Tr. 65).
7 Plaintiff also stated he does not do well in the public and has
8 issues with fear, anger and irritability (Tr. 65-66). Plaintiff
9 was additionally taking medication for depression and anxiety at
10 the time (Tr. 66-67).

11 Plaintiff testified he spends his days watching television
12 and hanging out with his girlfriend (Tr. 68). He was additionally
13 performing about five hours of maintenance work around his
14 facility each week (Tr. 68). Plaintiff indicated he attended
15 Alcoholic's Anonymous meeting twice a week (Tr. 69).

16 SEQUENTIAL EVALUATION PROCESS

17 The Social Security Act (the Act) defines disability as the
18 "inability to engage in any substantial gainful activity by reason
19 of any medically determinable physical or mental impairment which
20 can be expected to result in death or which has lasted or can be
21 expected to last for a continuous period of not less than twelve
22 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
23 provides that a plaintiff shall be determined to be under a
24 disability only if any impairments are of such severity that a
25 plaintiff is not only unable to do previous work but cannot,
26 considering plaintiff's age, education and work experiences,
27 engage in any other substantial gainful work which exists in the
28 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

1 Thus, the definition of disability consists of both medical and
2 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
3 (9th Cir. 2001).

4 The Commissioner has established a five-step sequential
5 evaluation process for determining whether a person is disabled.
6 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
7 is engaged in substantial gainful activities. If so, benefits are
8 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If
9 not, the decision maker proceeds to step two, which determines
10 whether plaintiff has a medically severe impairment or combination
11 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
12 416.920(a)(4)(ii).

13 If plaintiff does not have a severe impairment or combination
14 of impairments, the disability claim is denied. If the impairment
15 is severe, the evaluation proceeds to the third step, which
16 compares plaintiff's impairment with a number of listed
17 impairments acknowledged by the Commissioner to be so severe as to
18 preclude substantial gainful activity. 20 C.F.R. §§
19 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
20 App. 1. If the impairment meets or equals one of the listed
21 impairments, plaintiff is conclusively presumed to be disabled.
22 If the impairment is not one conclusively presumed to be
23 disabling, the evaluation proceeds to the fourth step, which
24 determines whether the impairment prevents plaintiff from
25 performing work which was performed in the past. If a plaintiff
26 is able to perform previous work, that plaintiff is deemed not
27 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
28 this step, plaintiff's residual functional capacity (RFC) is

1 considered. If plaintiff cannot perform past relevant work, the
2 fifth and final step in the process determines whether plaintiff
3 is able to perform other work in the national economy in view of
4 plaintiff's residual functional capacity, age, education and past
5 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v);
6 *Bowen v. Yuckert*, 482 U.S. 137 (1987).

7 The initial burden of proof rests upon plaintiff to establish
8 a *prima facie* case of entitlement to disability benefits.
9 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
10 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
11 met once plaintiff establishes that a physical or mental
12 impairment prevents the performance of previous work. The burden
13 then shifts, at step five, to the Commissioner to show that (1)
14 plaintiff can perform other substantial gainful activity and (2) a
15 "significant number of jobs exist in the national economy" which
16 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
17 Cir. 1984).

18 STANDARD OF REVIEW

19 Congress has provided a limited scope of judicial review of a
20 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
21 the Commissioner's decision, made through an ALJ, when the
22 determination is not based on legal error and is supported by
23 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
24 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
25 1999). "The [Commissioner's] determination that a plaintiff is
26 not disabled will be upheld if the findings of fact are supported
27 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
28 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence

1 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
2 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
3 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989).
4 Substantial evidence "means such evidence as a reasonable mind
5 might accept as adequate to support a conclusion." *Richardson v.*
6 *Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch
7 inferences and conclusions as the [Commissioner] may reasonably
8 draw from the evidence" will also be upheld. *Mark v. Celebrezze*,
9 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers
10 the record as a whole, not just the evidence supporting the
11 decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20,
12 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526
13 (9th Cir. 1980)).

14 It is the role of the trier of fact, not this Court, to
15 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
16 evidence supports more than one rational interpretation, the Court
17 may not substitute its judgment for that of the Commissioner.
18 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
19 (9th Cir. 1984). Nevertheless, a decision supported by
20 substantial evidence will still be set aside if the proper legal
21 standards were not applied in weighing the evidence and making the
22 decision. *Browner v. Secretary of Health and Human Services*, 839
23 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
24 evidence to support the administrative findings, or if there is
25 conflicting evidence that will support a finding of either
26 disability or nondisability, the finding of the Commissioner is
27 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
28 1987).

DAA ANALYSIS

An otherwise disabled individual is not entitled to disability benefits under the Act if drug addiction or alcoholism (DAA) is a contributing factor material to disability. The Contract With America Advancement Act of 1996, Pub. L. No. 104-121 § 105(a)9C), amended the definition of disability under the Act to prohibit entitlement to disability benefits under Titles II and XVI for any individual whose disability is based on DAA. Title II of the Act now states: "An individual shall not be considered to be disabled for purposes of this title if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled." 42 U.S.C. § 423(d)(2)(c). Title XVI of the Act contains a similarly worded provision for purposes of determining eligibility for SSI disability benefits. 42 U.S.C. § 1382c(a)(30)(J).

The Commissioner's disability regulations likewise state, "if we find that you are disabled and have medical evidence of your drug addiction or alcoholism, we must determine whether your drug addiction or alcoholism is a contributing factor material to the determination of disability." 20 C.F.R. § 416.935(a).

Specifically, the "key factor" the Commissioner "will examine in determining whether drug addiction or alcoholism is a contributing factor material to the determination of disability is whether we would still find you disabled if you stopped using drugs or alcohol." 20 C.F.R. § 416.935(b). "If we determine that your remaining limitations would not be disabling, we will find that

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1 your drug addiction or alcoholism is a contributing factor
2 material to the determination of disability." *Id.*

3 If the ALJ finds the claimant disabled and there is medical
4 evidence of DAA, the ALJ must determine the materiality of the
5 claimant's DAA to his disability. The ALJ must perform the
6 sequential evaluation process a second time, separating out the
7 impact of the claimant's DAA, to determine if he would still be
8 found disabled if he stopped using drugs or alcohol. *Bustamante*
9 *v. Massanari*, 262 F.3d 949, 955 (9th Cir. 2001). The claimant
10 bears the burden of proving that DAA is not a contributing factor
11 material to his disability. *Parra v. Astrue*, 481 F.3d 742, 744-
12 745, 748 (9th Cir. 2007).

13 **ALJ'S FINDINGS**

14 At step one, the ALJ found plaintiff has not engaged in
15 substantial gainful activity since January 1, 2007, the amended
16 alleged onset date (Tr. 19). At step two, she found plaintiff had
17 severe impairments of "adjustment disorder, alcohol dependence,
18 and amphetamine dependence" (Tr. 19). At step three, the ALJ
19 found plaintiff's impairments, including the substance use
20 disorder, met sections 12.04 and 12.09 of the listed impairments
21 in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4 (Tr. 24).
22 However, the ALJ then assessed plaintiff's impairments if he
23 stopped the substance use and determined that his impairments,
24 alone and in combination, did not meet or medically equal one of
25 the listed impairments in 20 C.F.R., Appendix 1, Subpart P,
26 Regulations No. 4 (Tr. 25).

27 The ALJ assessed plaintiff's RFC if he stopped the substance
28 use and concluded that plaintiff could perform a full range of

1 work at all exertional levels, but with the following
2 nonexertional limitations: he is capable of understanding,
3 remembering and carrying out simple and more complex
4 instructions/tasks and contact with the public and coworkers
5 should be limited to minimal and superficial (Tr. 26). The ALJ
6 found that plaintiff's medically determinable impairments could
7 reasonably be expected to produce his alleged symptoms but that
8 plaintiff's statements concerning the intensity, persistence and
9 limiting effects of those symptoms were not credible to the extent
10 they were inconsistent with the ALJ's RFC assessment (Tr. 27).

11 At step four, The ALJ found that if plaintiff stopped the
12 substance use, he would be able to perform his past relevant work
13 as a material handler, construction worker I, band rip saw
14 operator, and disk sander (TR. 29-30). The ALJ thus determined
15 that plaintiff was not under a disability within the meaning of
16 the Act at any time through the date of her decision (Tr. 30).
17 The ALJ indicated that since she found that plaintiff would not be
18 disabled if he stopped the substance use, plaintiff's substance
19 use disorder was a contributing factor material to the
20 determination of disability (Tr. 30).

21 ISSUES

22 Plaintiff contends he is more limited from a psychological
23 standpoint than what was determined by the ALJ. (ECF No. 14 at 9-
24 13). Plaintiff specifically argues the ALJ erred by failing to
25 properly consider the opinions of certain examining medical
26 sources and instead relying on the opinions of a non-treating,
27 non-examining medical professional when determining plaintiff's
28 mental RFC.

DISCUSSION

I. Plaintiff's Credibility

While plaintiff has not challenged with specificity the ALJ's finding that plaintiff is not fully credible,² the undersigned finds the ALJ's credibility determination significant in this case.

The ALJ indicated several reasons why plaintiff was not entirely credible (Tr. 28). In addition to inconsistencies between plaintiff's statements and the objective medical evidence,³ the ALJ noted the following record evidence which

²Plaintiff provides one sentence in his memorandum which states, "Mr. Broome; further, does not believe that the ALJ properly considered nor rejected Broome." (ECF No. 14 at 11-12). Plaintiff, however, fails to provide any support or authority for this assertion. See *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1164 (9th Cir. 2003) (noting that we "ordinarily will not consider matters on appeal that are not specifically and distinctly argued in an appellant's opening brief").

³The ALJ outlined plaintiff's inconsistent reports of drug use and sobriety (Tr. 28). Plaintiff reported in February 2005 he had been off of drugs since December 2004 and off of alcohol for over six years; March 2005 emergency room records indicate he presented for detoxification after drinking heavily for several days and it was noted he had been clean for 14 months; in April 2005 it was noted he had one alcohol binge since undergoing a drug addiction program; also in April 2005 he presented for alcohol and heroin withdrawal and it was noted he drank heavily everyday; in April 2006 it was noted he last used methamphetamine two months prior; on August 23, 2006, he reported last using methamphetamine in July 2006; on September 3, 2007, it was noted he drinks alcohol and uses methamphetamine; on February 20, 2009, he indicated he last used alcohol in February 2008 and last used methamphetamine in November 2007; on May 16, 2009, he presented after trying to get drunk by drinking hand sanitizer; and he stated in his appeal that he had relapsed on pain pills on April 24, 2010. Not only does the foregoing evidence inconsistencies with plaintiff's drug and alcohol reporting, it also demonstrates that plaintiff has used alcohol and illicit drugs during the period of time following his alleged onset date.

1 suggested plaintiff had engaged in malingering and exaggeration:
2 on the Beck Depression Inventory his score indicated over-
3 reporting of depressive symptoms; his profile on the MMPI-2 was
4 invalid suggesting he was over-reporting negative and pathological
5 symptoms; and Dr. McKnight testified the PAI established a form of
6 symptom magnification (Tr. 28).

7 The ALJ's determination that plaintiff's statements were not
8 fully credible is thus supported by the evidence of record in this
9 matter. Since plaintiff was properly found by the ALJ to be not
10 entirely credible, the ALJ appropriately accorded little weight to
11 medical reports based primarily on his subjective complaints. See
12 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (a
13 physician's opinion premised primarily on a claimant's subjective
14 complaints may be discounted where the record supports the ALJ's
15 discounting of the claimant's credibility); *Morgan v. Comm'r. of*
16 *Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999) (the opinion
17 of a physician premised to a large extent on a claimant's own
18 account of symptoms and limitations may be disregarded where they
19 have been properly discounted).

20 **II. Mental Limitations**

21 Plaintiff argues that limitations assessed by W. Scott Mabee,
22 Ph.D., and John Arnold, Ph.D., reflect greater restrictions from a
23 psychological standpoint than assessed by the ALJ, and the ALJ
24 erred by not according these medical professionals greater weight.
25 (ECF No. 14 at 8-13). Plaintiff argues the ALJ erred by instead
26 according significant weight to the opinions of the medical
27 expert, R. Thomas McKnight, Ph.D., when assessing his mental
28 limitations.

1 In a disability proceeding, the courts distinguish among the
2 opinions of three types of physicians: treating physicians,
3 physicians who examine but do not treat the claimant (examining
4 physicians) and those who neither examine nor treat the claimant
5 (nonexamining physicians). *Lester v. Chater*, 81 F.3d 821, 839
6 (9th Cir. 1996). The Ninth Circuit has held that "[t]he opinion
7 of a nonexamining physician cannot by itself constitute
8 substantial evidence that justifies the rejection of the opinion
9 of either an examining physician or a treating physician."
10 *Lester*, 81 F.3d at 830. Rather, an ALJ's decision to reject the
11 opinion of a treating or examining physician, may be *based in part*
12 on the testimony of a nonexamining medical advisor. *Magallanes*,
13 881 F.2d at 751-55; *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th
14 Cir. 1995). The ALJ must also have other evidence to support the
15 decision such as laboratory test results, contrary reports from
16 examining physicians, and testimony from the claimant that was
17 inconsistent with the physician's opinion. *Magallanes*, 881 F.2d
18 at 751-52; *Andrews*, 53 F.3d 1042-43. Moreover, an ALJ may reject
19 the testimony of an examining, but nontreating physician, in favor
20 of a nonexamining, nontreating physician only when he gives
21 specific, legitimate reasons for doing so, and those reasons are
22 supported by substantial record evidence. *Roberts v. Shalala*, 66
23 F.3d 179, 184 (9th Cir. 1995).

24 Dr. McKnight testified as a medical expert at the
25 administrative hearing (Tr. 49-58). Dr. McKnight stated the
26 records reflect plaintiff has serious problems with alcohol and
27 amphetamine dependence (Tr. 49). He indicated Dr. Mabey's
28 September 2009 notations of marked limitations and social problems

1 were directly at odds with the narrative report and treatment
2 notes which describe plaintiff in fairly positive terms (Tr. 50).
3 He also indicated the MMPI profiles completed in February 2009 and
4 March 2010 were grossly invalid because of over reporting by
5 plaintiff (Tr. 51). Dr. McKnight testified that the recent
6 treatment notes from the Family Youth Adult Connections reflected
7 plaintiff was living with his girlfriend and doing maintenance
8 work and suggested plaintiff was doing well with being sober (Tr.
9 52). Dr. McKnight testified that absent the impact of the alcohol
10 and drug abuse, plaintiff seemed to be doing reasonably well (Tr.
11 52-53). Dr. McKnight specifically opined that absent the impact
12 of drugs and alcohol plaintiff's restrictions of activities of
13 daily living would be mild, restrictions of social functioning
14 would be mild, difficulties maintaining concentration, persistence
15 and pace would be mild, and there would be no episodes of
16 decompensation (Tr. 53). The ALJ accorded Dr. McKnight's opinion
17 significant weight (Tr. 29).

18 As noted above, "[t]he opinion of a nonexamining physician
19 cannot by itself constitute substantial evidence that justifies
20 the rejection of the opinion of either an examining physician or a
21 treating physician." *Lester*, 81 F.3d at 830. In this case, while
22 the ALJ accorded significant weight to the testimony of the
23 medical expert, substantial evidence in addition to Dr. McKnight's
24 testimony justifies the ALJ's rejection of those portions of
25 medical reports which are not consistent with the ALJ's RFC
26 determination. See *infra*.

27 On December 9, 2008, Steven E. Erickson, M.Ed., LMHC, under
28 the supervision of Dr. Mabee, examined plaintiff while he was

1 incarcerated at the Geiger Correctional Center (Tr. 261-264, 272-
2 276). Plaintiff reported difficulty obtaining and keeping a job
3 because of drug and alcohol abuse, and it was noted plaintiff had
4 spent a total of one and a half years in jail for second degree
5 robbery (Tr. 272-273). Plaintiff was diagnosed with dysthymic
6 disorder and ETOH and Amphetamine abuse in early full remission
7 (Tr. 275) Plaintiff was given a GAF score of 55⁴ (Tr. 275). It
8 was opined that plaintiff should be capable of addressing more
9 complex cognitive requirements in the absence of methamphetamine
10 and alcohol abuse and that he appeared capable of employment
11 should he receive the necessary treatment for his methamphetamine
12 and alcohol abuse (Tr. 275). Mr. Erickson additionally filled out
13 a Psychological/Psychiatric Evaluation form and checked boxes
14 indicating that plaintiff had moderate limitations in his
15 abilities to exercise judgment and make decisions, respond
16 appropriately to and tolerate the pressures and expectations of a
17 normal work setting, and control physical or motor movements and
18 maintain appropriate behavior (Tr. 263).

19 On February 20, 2009, plaintiff was examined by Amy Robinson,
20 MS, under the supervision of Dr. Mabee (Tr. 265-271, 277-280).
21 Plaintiff reported he was unable to work due to fear of using
22 methamphetamine and felt little ambition or interest to do things
23 (Tr. 266, 269). On testing, over-reporting of depressive symptoms
24 was indicated and the MMPI-2 was invalid suggesting the over-
25 reporting of negative and pathological symptoms (Tr. 268).

27 ⁴A GAF of 60-51 reflects: Moderate symptoms or moderate
28 difficulty in social, occupational, or school functioning. See
DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32 (4th ed. 1994).

1 Plaintiff was diagnosed with adjustment disorder with mixed
2 anxiety and depressed mood, alcohol abuse in sustained full
3 remission, and amphetamine abuse in sustained full remission and
4 given a GAF score of 55-60 (Tr. 268). It was opined that
5 plaintiff should be able to understand and follow simple as well
6 as more complex verbal and written instructions, he may have minor
7 difficulties with concentration and memory, and his persistence
8 and pace on a given task would be average, but as the tasks
9 increase in demand, persistence and pace would decrease
10 proportionately to the task (Tr. 269). Ms. Robinson additionally
11 filled out a Psychological/Psychiatric Evaluation form and checked
12 boxes indicating that plaintiff had several moderate limitations
13 in his functional abilities (Tr. 279).

14 On September 1, 2009, Dr. Mabee examined plaintiff (Tr. 324-
15 333). It was noted that plaintiff had been placed in a
16 psychiatric facility a few months prior to the exam for
17 observation until his blood alcohol level was lowered enough to be
18 transferred to a detox facility (Tr. 324). Dr. Mabee diagnosed
19 alcohol dependence in early full remission (per patient report),
20 amphetamine abuse in sustained full remission (per patient
21 report), and adjustment disorder with mixed anxiety and depressed
22 mood and gave plaintiff a GAF score of 56 (Tr. 326). Despite a
23 GAF score indicative of only moderate symptoms, Dr. Mabee opined
24 plaintiff would have marked limitations with his ability to relate
25 appropriately to coworkers and supervisors, interact appropriately
26 in public contacts, respond appropriately to and tolerate the
27 pressures and expectations of a normal work setting, and maintain
28 appropriate behavior in a work setting (Tr. 327). However, Dr.

1 Mabee also opined plaintiff would be capable of working without
2 supervision, could understand and carry out simple tasks with
3 little difficulty, should be able to do more complex tasks
4 efficiently with extended periods of sobriety, would be able to
5 sustain concentration for longer periods of time, would perform
6 better in positions that had minimal contact with others (at least
7 until his symptoms are stable and he has maintained sobriety) and
8 is capable of recognizing hazards and taking appropriate
9 precautions (Tr. 327). Dr. Mabee expected plaintiff to be
10 impaired to the degree indicated for six to nine months (Tr. 328).

11 On March 26, 2010, plaintiff was evaluated by Dr. Arnold (Tr.
12 336-345). On testing, Dr. Arnold noted that plaintiff's MMPI-2
13 profile was invalid due to over reporting psychopathology (Tr.
14 341). Nevertheless, Dr. Arnold diagnosed alcohol dependence in
15 early full remission (per patient report), amphetamine abuse in
16 sustained full remission (per patient report), and adjustment
17 disorder with mixed anxiety and depressed mood and gave plaintiff
18 a GAF score of 57 (Tr. 338). Inconsistent with his assessed GAF
19 score, Dr. Arnold opined plaintiff would have a marked limitation
20 with his ability to maintain appropriate behavior in a work
21 setting (Tr. 339). However, Dr. Arnold also opined plaintiff
22 would be capable of understanding and carrying out simple and
23 moderately complex instructions, could only concentrate for short
24 periods of time if he is in a social situation, could work without
25 close supervision and make work-related decisions, would work
26 better in positions that have minimal contact with others, could
27 ask necessary questions, and could recognize hazards and take
28 appropriate precautions (Tr. 339). Dr. Arnold expected plaintiff

1 to be impaired to the degree indicated for six to nine months (Tr.
2 328).

3 In this case, the ALJ concluded that if plaintiff stopped the
4 substance use, he would be able to perform jobs requiring
5 understanding, remembering and carrying out simple and more
6 complex instructions/tasks, but his contact with the public and
7 coworkers should be limited to minimal and superficial (Tr. 26).
8 The ALJ indicated that if plaintiff stopped the substance use, he
9 would have a mild restriction in activities of daily living, mild
10 difficulties in social functioning, moderate difficulties in
11 concentration, persistence and pace⁵, and no episodes of
12 decompensation (Tr. 25). Accordingly, contrary to plaintiff's
13 argument, the ALJ's RFC determination is essentially consistent
14 with the above medical reports which generally reflect moderate
15 limitations, an ability to understand and carry out simple tasks
16 with little difficulty, the ability to do more complex tasks
17 efficiently with sobriety, and the opinion that plaintiff would
18 work better in positions that have minimal contact with others.
19 *See supra*.

20 Only the check-box reports of Drs. Mabee and Arnold, which
21 indicate some marked limitations, are inconsistent with the ALJ's
22 mental RFC determination in this case. However, as discussed by
23 the ALJ, the findings indicated on those check-box forms
24 contradict the narrative reports of Drs. Mabee and Arnold which
25 reflect only mild to moderate limitations and indicate plaintiff

27 ⁵By finding plaintiff to be moderately limited in his
28 concentration, persistence and pace, the ALJ determined plaintiff
was limited to a greater extent than as assessed by Dr. McKnight.

1 is able to understand and carry out simple tasks with little
2 difficulty and should be able to do more complex tasks efficiently
3 with extended periods of sobriety (Tr. 29). Moreover, also as
4 noted by the ALJ, the reports which indicate marked limitations
5 estimate that the length of time plaintiff would be impaired to
6 this degree would only be six to nine months (Tr. 29). The
7 limitations would thus not meet the duration requirements of the
8 Act (one year). 42 U.S.C. § 1382c(a)(3)(A). Finally, as
9 discussed above, since plaintiff was properly found by the ALJ to
10 be not entirely credible, it was appropriate for the ALJ to accord
11 little weight to medical reports based primarily on plaintiff's
12 subjective complaints, and the MMPI profiles completed in February
13 2009 and March 2010 were deemed invalid because plaintiff had over
14 reported psychopathology.

15 It is the responsibility of the ALJ to determine credibility,
16 resolve conflicts in medical testimony and resolve ambiguities.
17 *Saelee v. Chater*, 94 F.3d 520, 522 (9th Cir. 1996). The Court has
18 a limited role in determining whether the ALJ's decision is
19 supported by substantial evidence and may not substitute its own
20 judgment for that of the ALJ even if it might justifiably have
21 reached a different result upon de novo review. 42 U.S.C. §
22 405(g). Where, as here, the ALJ has made specific findings
23 justifying a decision, and those findings are supported by
24 substantial evidence in the record, our role is not to second-
25 guess that decision. *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir.
26 1989). Based on the foregoing, the ALJ did not err by rejecting
27 those portions of medical reports which are not consistent with
28 the ALJ's RFC determination and for according weight to the

1 opinions of the medical expert, Dr. McKnight. Those reasons are
2 supported by substantial record evidence. *Roberts*, 66 F.3d at
3 184. The substantial weight of the record evidence supports the
4 ALJ's mental RFC determination as well as her ultimate conclusion
5 in this case.

6 **CONCLUSION**

7 Having reviewed the record and the ALJ's findings, the Court
8 determines that the ALJ's decision is free of legal error and
9 supported by substantial evidence. Accordingly,

10 **IT IS HEREBY ORDERED:**

11 1. Defendant's Motion for Summary Judgment (**ECF No. 16**) is
12 **GRANTED.**

13 2. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is
14 **DENIED.**

15 **IT IS SO ORDERED.** The District Court Executive is directed
16 to file this Order, provide copies to the parties, enter judgment
17 in favor of Defendant, and **CLOSE** this file.

18 **DATED** this 27th day of March, 2013.

19 S/Fred Van Sickle
20 Fred Van Sickle
21 Senior United States District Judge
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